In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 361

CLIFFORD L. LIONBERGER, d.b.a.
LIONBERGER'S AUTO PARTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 3403(b) of the Internal Revenue Code of 1939[1] imposed an excise tax on a manufacturer's "sale[s]" of "chassis and bodies for trailers and semi-trailers * * * suitable for use in connection with passenger automobiles * * *." Section 3440 of the 1939 Code[2] stated, "the lease of an article (including any renewal or any extension of a lease or any subsequent

[1] Now Section 4061(a)(2)(b) of the Internal Revenue Code of 1954.

[2] Until extensively amended in 1958 (see pp. 4–5 *infra*), Section 4217 of the 1954 Code was the same as Section 3440 of the 1939 Code.

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lease of such article) * * * shall be considered a taxable sale of such article." Petitioner, doing business as a sole proprietorship, manufactured such trailers and was also in the "U-Haul" business of leasing them to the public (Pet. 21). The question presented here is whether, as the Court of Claims held, the Commissioner of Internal Revenue correctly ruled that Section 3440 taxed each of petitioner's leases of each trailer he manufactured, or whether, as petitioner argues, the due process clause of the Fifth Amendment forbade the application of Section 3440 except to the first lease of each trailer.[3]

During the years in question—1951 through 1954—petitioner filed no excise tax returns. This failure was discovered during an examination of petitioner's income tax returns. Delinquent returns were then filed. In those returns petitioner measured his excise tax liability solely on the basis of the amount received for the first lease of each trailer (Pet. 22).

The Commissioner assessed a deficiency of $16,790.02 based on the position that each successive lease of each trailer was subject to the tax imposed by Section 3403(b). Petitioner paid the assessment and sued for a refund in the Court of Claims. That court sustained the

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[3] Petitioner's leasing activities were pursuant to his participation in the Nationwide Trailer Rental System. He thus could make a "one-way" lease under which the trailer would be returned to another Nationwide member in another locality, and any subsequent lease would be made by that other member. Petitioner does not reassert in this Court (Pet. 16) his arguments, rejected below (Pet. 29–35), that the other Nationwide members were not his agents in making subsequent leases of petitioner's trailers.

Commissioner's position and dismissed the suit[4] (Pet. 22, 26).

The decision of the Court of Claim is correct. Congress in 1958 amended the Internal Revenue Code in a manner which moots the issue for taxable years after 1958. There is no warrant for review in this Court.

1. Petitioner claims to attack "only the unreasonable manner" in which the Internal Revenue Service "interpreted and implemented" Section 3440, and to make no attack upon the statute itself (Pet. 12). But there is absolutely nothing in the statute or the legislative history to indicate that Congress intended anything other than what the statute clearly and unequivocally states—that each lease by a manufacturer of a taxable article, "including * * * any subsequent lease" was to be taxed as a sale. As the Ninth Circuit held in *McClintock* v. *Westover*, 167 F. 2d 601, petitioner is wrong in contending (Pet. 12–13) that Congress intended to tax only leases which were conditional sales in disguise. This statute, as do other tax statutes, necessarily discriminates in the sense of imposing a different total tax liability on one means of using an asset to produce income—here a succession of leases—than on another type of transaction, such as a sale. But the tax rate of 10 per cent of the rental[5] was

[4] There is no merit to petitioner's contention (Pet. 8–11, 15–17) that the Court of Claims failed to consider his constitutional argument. See the opinion of the Commissioner of the Court of Claims, which the Court of Claims adopted, at Pet. 27–28.

[5] See Section 3403(b) of the 1939 Code.

certainly not confiscatory. Congress indeed contemplated that a manufacturer would pass the tax on by adding the tax to the rent or sales price. See Section 2407(b) of the 1939 Code. Petitioner's failure to take this course was the result of two decisions he made: not to pay any tax—which by law precluded his passing it on (see Section 3325 of the 1939 Code)—and to conduct his leasing business through the same business entity as his manufacturing business, rather than using separate corporate entities, as did his competitors.

Certainly there is nothing here to create one of those "rare and special instances," *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44, where the Fifth Amendment limits the taxing power of Congress.[6]

2. Congress recognized that the interpretation given Section 3440 below was indeed the meaning intended, and agreed that the section in some circumstances worked the inequities of which petitioner complains.[7] Therefore Congress amended the statute to eliminate those inequities. In 1958 Congress changed Section 4217 of the 1954 Code—which was identical to Section 3440—to provide that the total excise tax imposed on leases of an article by a manufacturer should be limited to an amount not exceeding the tax which would have been imposed on a sale made at a fair

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[6] If petitioner intended to claim that that the decision below in some manner "contradicts" Justice Cardozo's opinion in *Steward Machine Co.* v. *Davis*, 301 U.S. 548, upholding the Social Security tax (see Pet. 8–11), he points to nothing in the facts or analysis in *Steward* to support his position.

[7] See the legislative history collected in the opinion of the Court of Claims Commissioner (Pet. 25–26).

market value at the time of the first lease of the article. See Section 117(a) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275, 1280. Petitioner's arguments thus could not be made with respect to taxable years after September 2, 1958, the effective date of the 1958 Act. Thus the issue is of no continuing importance.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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